Committee on Resources

Witness Testimony

Testimony

on behalf of the

ARIZONA CATTLE GROWERS' ASSOCIATION

in regard to

Implementation of the Endangered Species Act

submitted to

House Committee on Resources

submitted by

Jeff Menges

Second Vice President

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Introduction

Mr. Chairman, my name is Jeff Menges. I am a fourth generation rancher from southeastern Arizona and I am currently serving as second vice-president of the Arizona Cattle Growers' Association (ACGA).

I want to thank Chairman Young and the House Committee on Resources for holding this oversight hearing and for inviting me to testify on behalf of over 2,000 Arizona Cattle Growers regarding the use of the citizen suit provision of the Endangered Species Act to terminate grazing in the southwestern part of the United States. 16 U.S.C. 1540(g). I will utilize my time today by recounting for the Committee my own personal experiences with lawsuits filed by the Southwest Center for Biological Diversity and the Forest Guardians on BLM allotments that my family has been utilizing for nearly twenty years.

This process is fundamentally wrong and has left ranchers disillusioned and has increased distrust of the agency personnel we must work with on our allotments. In the case I just mentioned, the cattle growers were brought into the process by the agency and then we were sold out by the same agency that enlisted our assistance. The Arizona cattlemen's associations had expert witnesses prepared to testify as to the benefits that can result from grazing in riparian areas, that it is not always necessary to exclude grazing to ensure the

continued existence of the species in question, and that excluding grazing could be potentially harmful to some of the endangered species. Unfortunately, these witnesses were never heard because the agreement that was reached between the government and the environmental groups quickly brought an end to the "hearing."

Utilizing Federal Lands is Crucial to the Ranching Industry in Arizona

First, I want to point out that the ability to continue utilizing federal lands is crucial to the future of the ranching industry, particularly in Arizona. In our state, the federal government and the Indian tribes own more than 73% of the land and these federal lands are intermingled with state and privately owned lands. This intermingled land ownership pattern makes nearly every viable ranching operation dependent to some degree on the ability to utilize the federal lands for grazing. This attack by the environmentalist groups on the practice of federal lands grazing is having the effect of destroying the entire ranching industry in Arizona, an industry that currently provides beef for approximately seven million people. This ongoing and overzealous use of the citizen suit provision of the ESA is forcing hard working ranch families into removing their cattle from the very allotments they have spent their lives stewarding -- allotments which are in better condition today than at any other time in history.

For most ranchers, it is a lifetime goal to pass the family ranch to the next generation as our parents and grandparents have done for the past one hundred years. Good stewardship of the lands from which we make our living and which makes this possible is in the best interest of every ranching family. Nevertheless, there are a number of interest groups that make no secret of the fact that they intend to remove all cattle from the federal lands in the southwestern part of the United States and they have found a method of utilizing the ESA to do just that.

Environmentalist Groups are Systematically Removing Cattle from the Southwest

The following is a typical scenario of how the groups proceed under the ESA: First, the group determines the area in which it wants to see the cattle removed. Next, the group finds a species that occupies, or could potentially occupy, the area and petitions to get the species listed as "endangered" pursuant to the ESA. Then, the group files suit against the action agency, either the Forest Service (FS) or the Bureau of Land Management (BLM) under the citizen's suit provision of the ESA which provides: "… any citizen may request to enjoin any person 'alleged' to be in violation of the Act…" 16 U.S. C. §1540 (g)(1)(A). Typically, the group bases its suit on the allegation that the land management agency has not entered Section 7 Consultation as required for protection of the species and asserting that grazing constitutes a "taking" pursuant to Section 9 of the ESA. Next, the group will ask the court to grant a preliminary injunction to prohibit any grazing activity until a decision on the merits can be made. The next step is for the environmentalist group and the land management agency to settle, out-of-court, whereby the FS or the BLM agrees to remove the cattle from the area and the environmentalist group agrees to drop the suit. More often than not, the environmentalists will obtain an award for costs and fees based upon a section within the ESA that provides authority for the ruling court to grant such awards whenever it sees fit. Id. at §1540 (g)(3)(B)(4). The group uses the fee award to finance filing its next lawsuit. This process repeated over and over again across the entire southwestern part of this country is effectively eliminating the entire ranching industry. In my own case, with more than 90% of my operation existing on federal lands, assuming this trend continues, my only option is to take the remaining private land I have left, subdivide and sell it for real estate development.

The Land Management Agencies Fail to Defend Their Own Federal Lands Grazing Programs

Recently, I was called as an expert witness in the U.S. District Court in Tucson, Arizona where the Southwest Center for Biological Diversity and the Forest Guardians were seeking a preliminary injunction precluding continuation of grazing on over 100 Forest Service allotments in Arizona and New Mexico. The Forest Service requested that the Arizona Cattle Growers intervene in the process. Believing the Forest Service intended on defending its grazing program, and realizing that the injunction had the potential of putting our ranchers out of business, the ACGA had no alternative but to request intervenor status. Therefore, the ACGA intervened in the lawsuit at a cost to us and the New Mexico Cattle Growers of approximately $100,000 only to have the FS settle with the environmentalists "behind closed doors" resulting in removal of cattle from all riparian areas. In this case, the cattle growers were neither privy to, nor included in, the negotiation process yet the U.S. Department of Justice attorneys attempted to get the court to sign the negotiated settlement agreement. The court refused to sign the order but, nevertheless, the Forest Service is currently implementing the terms of the settlement agreement by modifying annual operating plans on Forest Service allotments. Something is drastically wrong with this process whereby standing to sue is as easy as alleging a violation of the ESA and where settlement agreements can be arranged without involving the affected parties in the process. A grazing permit represents a contract between the individual rancher and the government. I know of no other arena which provides a mechanism in which an outside interest is allowed to alter or terminate a contract without consulting the affected parties. It is fundamentally wrong for the land management agencies to negotiate altering our grazing permits without including us in the process.

Litigation is Driving Public Lands Management Decisions

A second suit that I want to address with the Committee was filed by the Southwest Center for Biological Diversity was the result of a Biological Opinion (BO) released by the U.S. Fish and Wildlife Service regarding the BLM allotments utilized by my operation and affecting approximately 1.6 million acres and 288 BLM allotments. In this case, the environmentalists alleged that the BLM failed to consult with the Fish and Wildlife Service as required under the ESA. However, the released findings stated in the Biological Opinion established that cattle grazing was not adverse to any listed or potentially listed species and that cattle grazing would not adversely affect any potential habitat, thereby precluding the Consultation requirement. Nevertheless, the environmentalists alleged that grazing in these riparian areas constitutes a "taking" of the pygmy owl and the razorback sucker both listed as endangered pursuant to the ESA. As a result, the BLM entered into a similar process I described above resulting in an agreement that forces me to terminate grazing on approximately nine miles of riparian area within my allotments despite the fact that there is no indication that either of these species occupy these particular riparian areas, nor have these areas been designated as critical habitat. Furthermore, the BLM admits that the riparian areas within our allotments exhibit an upward trend.

In fact, I entered into a cooperative agreement with the BLM allowing me to implement a winter grazing program on these allotments. The availability of this annual spring forage is invaluable to my ranching operation. I have been grazing this particular area under the agreement since 1990 and as recently as 1995 this was the only segment within the 29 miles of riparian area monitored by the BLM that was determined to meet the criteria for "proper functioning condition"(PFC).

I have provided pictures which illustrate the positive vegetative response in this riparian area. Clearly, these pictures show, and the BLM cannot deny, that we have effectively accomplished every environmental goal established by the BLM at the onset of the grazing program. Furthermore, in 1995, I received a "grazing excellence" award from the Society for Range Management for our efforts. Yet, despite the success of my efforts, earlier this year I received a Full Force and Effect Decision by the BLM ordering me to remove all

livestock from these riparian areas for the next ten years (and presumably permanently). I filed appealing the decision, but pursuant to regulations governing such appeals, the order to remove my cattle remains in full force and effect pending decision on the appeal. 43 C.F.R. 4.477. Furthermore, the burden of proving that our livestock should remain on the allotment according to the terms of our cooperative agreement lies with the rancher. Assuming I have the resources to defend an agreement on one allotment, it's unlikely that I can continue to defend myself when the next challenge arises. It becomes obvious that the administrative appeals afford little relief to the average operator.

Ranchers are disillusioned by the Appearance of Impropriety Surrounding these Settlement Agreements

This process of filing lawsuits only to romance the agency into backroom agreements with the environmental community has left ranchers disillusioned and created increased level of distrust of the agency personnel we have worked with for several years. Time and time again, the cattle growers have been invited to join in the litigation process by the agency only to be sold out by the same folks that asked for our help. We are astounded by the apparent willingness of the land management agencies, an arm of our federal government, to succumb to the demands of these opposition groups. To illustrate my point, I want to provide you with an example of how blatant this can be.

On the morning following the hearing in Tucson in which I was called as an expert witness, and to which I referred earlier in my testimony, I was sitting in a room at the hotel where all parties to the litigation were gathered for a continental breakfast. A local news program announced that "one of the largest cattle removals in the history of the public lands would be occurring in New Mexico and Arizona." A large group consisting of Forest Service employees, Southwest Center for Biological Diversity and Forest Guardian members and their attorneys cheered and clapped the announcement of the previous day's settlement agreement between the groups. It was apparent to me on whose team those federal officials were playing.

The Forest Service and BLM remain under a legal mandate to maintain grazing programs, but it is apparent by the actions of the agencies that there are many federal lands managers that give only lip service to such programs and would much prefer to see livestock eliminated from the Southwest. What has become even more painfully obvious to the ranching community is that more and more the land management agencies we have worked with in the past are aligning themselves ideologically with the extreme environmentalist groups that make no secret of the fact that it is their goal to remove all livestock from the entire Southwest. Even more disheartening for us is the fact that without the ESA citizen suit provision and provisions for reimbursement of litigation costs much of this opposition activity would not be possible. Many of us have our life savings invested in our federal lands grazing permits and now we are forced to defend them against parties who invest little to none of their own resources.

Conclusion

The process is broken. Litigation is currently driving land management decision-making and the ESA citizen suit provision is fueling the ongoing litigation efforts. The ESA is being used to zone for owls, suckers and a number of other species that absolutely do not exist and may not even have existed historically in the area. Federal lands ranchers need relief from misuse of this process - these types of frivolous activities are not what Congress intended. The citizen suit provision of the ESA and the appeal process must be overhauled with consideration of the foregoing misuses in mind.

Until recently, I had been a strong supporter of the BLM and its grazing program. It distresses me to be in

confrontations with BLM officials that I considered as friends, but I have an obligation to my family to stand for what is right and to protect my family's future. I always believed that by caring for the land the way my parents, grandparents and great-grandparents did I was preserving an opportunity for my own children to engage in this ranching lifestyle should they so choose. But I am now convinced that if this "runaway train", the ESA, is not stopped, my children will not have that opportunity to earn their living by ranching.

Thank you for this opportunity and, if you have any questions, I will be glad to answer them.

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